A FAIR GO ALL ROUND: EXTENDING 'PROPER BASIS' CERTIFICATION TO UNFAIR DISMISSAL CLAIMS

EDA GÜL AND PAUL MAGUIRE

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A FAIR GO ALL ROUND: EXTENDING 'PROPER BASIS' CERTIFICATION TO UNFAIR DISMISSAL CLAIMS

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Australian employees seeking redress for unfair dismissal enjoy comparatively simple low-cost access to the justice system. The procedures and remedies under the law are intended to ensure that a 'fair go all round' is accorded to both the employer and employee. However, in the age of generative artificial intelligence (GenAI), it is questionable whether the system is achieving a just resolution of dismissal disputes according to law, quickly, inexpensively and efficiently as possible, if applicants are not under an obligation to demonstrate a proper basis to their claim.

This paper argues a suitably designed proper basis certification obligation, prevalent in Australian civil jurisdiction, extended to unfair dismissal disputes, can curb GenAI-amplified unmeritorious claims, and focus court and tribunal resources on matters with a sound factual and legal foundation, without undermining access to justice and the objective of a fair go all round.

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I INTRODUCTION

A Background

For more than three decades Australia's unfair dismissal jurisdiction has been built around accessibility, informality, and minimal cost, balancing the interests of employers and employees.

The objective of Part 3-2 of the *Fair Work Act 2009* (Cth) ('*Fair Work Act*') establishes a framework for dealing with claims of unfair dismissal balancing the needs of employers and employees. The procedures, remedies, and the manner of deciding on and determining such remedies, are intended to ensure a '*fair go all round'* in accordance with section 381.

The Australian Fair Work Commission ('FWC') is not bound by the rules of evidence but performs its functions and exercises its powers in a manner designed to be '… fair and just and is quick, informal and avoids unnecessary technicalities' (*Fair Work Act*: s 577). This hybrid inquisitorial/adversarial model of dispute resolution has generally served Australia well (Mourell & Cameron, 2009). However, generative artificial intelligence ('GenAI') threatens to up end that equilibrium of a fair go all round.

In 2023-24 there were 14,772 unfair dismissal applications to the FWC (Fair Work Commission, 2024). This rose to 16,500 applications in the financial year ending 30 June 2025 (Fair Work Commission, 2025). In the first six months of 2026, 9,719 applications for orders granting a remedy made under section 394 of the *Fair Work Act* were lodged (Fair Work Commission, 2026). Justice Hatcher, President of the Australian FWC addressing the Victorian Bar Association on 18 February 2026, attributes the sharp rise in dismissal applications since 2023–24, to widespread GenAI-generated content, and the ease with which GenAI can rapidly produce claims, including fabricated facts (Hatcher, 2026).

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It is evident GenAI has reshaped access to justice by lowering the time and cost of producing persuasive, form-ready applications.

B The Challenge of GenAI

While greater efficiency in drafting unlawful and unfair dismissal claims is not necessarily a cause of concern, GenAI generated applications, pleadings, appeals, statements and submissions containing fabricated facts and unverifiable case law is a problem. GenAI poses a significant challenge for the FWC to fulfil the obligation to perform its functions and exercise its powers in a manner that is fair and just and is quick, informal and avoids unnecessary technicalities (*Fair Work Act*: s 577).

The increasing use of GenAI imposes greater time, resources and costs on parties responding to applications as the FWC grapples with the additional burden of assessing the validity of claims, contentions of fact and law from parties that may have limited to no understanding of the factual and legal claims made in their GenAI material. As Justice Hatcher observed, '…it has become harder to quickly and efficiently identify and dispose of cases which do not have reasonable prospects of success.' (Hatcher, 2026: 6)

The response to the challenge of GenAI will be multi-faceted. A shift from the flexible inquisitorial model to stricter application of rules of evidence may be the inevitable outcome. However, a solution worth consideration drawn from the experience of the general law is the extension of the proper basis certification obligation, prevalent in Australian civil jurisdiction. While it would require considerable modification to account for the high percentage of self-represented applicants, it may at least curb the trend of GenAI-amplified unmeritorious claims enabling court and tribunal resources to focus on matters with a sound factual and legal foundation, without undermining the objective of a fair go all round.

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As Australian labour law has developed along its own distinct path, separated from the general law for much of the twentieth and early twenty-first centuries, the suitability of proper basis certification may seem alien to regulators, practitioners and academics that work in this field. However, as will be apparent from the next section summarising the constitutional and international legal foundations of the unfair dismissal jurisdiction in Australia, the progression from conciliation and arbitration to the application of corporations' law and incorporation of international law, offers a rational basis for blending civil legal procedure with alternative dispute resolution of unfair dismissals.

II THE CONSTITUTIONAL AND INTERNATIONAL FOUNDATIONS OF THE JURISDICTION

The jurisdiction of the Australian federal Parliament to legislate for regulation of employment termination and unfair dismissal rests upon two intersecting foundations. First, the heads of legislative power enumerated in the *Commonwealth of Australia Constitution Act 1900* ('*Australian Constitution'*). Secondly, Australia's obligations under international law, principally the International Labour Organization's ('ILO') Termination of Employment Convention, 1982 (No 158) ('Termination of Employment Convention') (International Labour Organization, 1982).

A Constitutional Foundations

For most of the twentieth century, federal industrial relations law was anchored to section 51(xxxv) of the *Australian Constitution*, the conciliation and arbitration power. That provision empowers the Commonwealth to make laws with respect to 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.'

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The existence of an interstate industrial dispute (frequently artificially orchestrated) as a jurisdictional prerequisite ensured a system of dual federal and state coverage that was fragmented and complex (O'Neill, 2003).

The decisive constitutional shift occurred with the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) and the High Court's validation of the law in *New South Wales v Commonwealth* [2006] HCA 52. The Commonwealth's constitutional reliance moved from the conciliation and arbitration of interstate industrial disputes to the corporations' power in section 51(xx), permitting laws with respect to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth' (*Australian Constitution*: s 51(xx)). Under this approach, the corporations power would effectively set the boundaries of labour regulation in the modern era, leaving Australian labour law largely absorbed into corporate law (McCallum, 2005). The *Fair Work Act* continues this approach.

The *Fair Work Act*'s unfair dismissal provisions rely on the corporations' power, supplemented by trade and commerce power, the territories power, and the external affairs power (*Australian Constitution*: ss 52(i), 122, 51(xxix)). The FWC's jurisdiction to determine whether a dismissal was 'harsh, unjust or unreasonable' under section 385 of the *Fair Work Act* is accordingly exercised within a constitutional framework centred on the employment relationship between employee and constitutional corporation.

B International Foundations

Australia's international law obligations provide the second foundation. In 1993, Australia ratified ILO Convention No. 158 on Termination of Employment, which establishes that employment shall not be terminated unless there is a valid reason connected with the capacity or conduct of the worker or based on the operational requirements of the enterprise (International Labour Organization, 1982).

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Article 4 of the Termination of Employment Convention requires that the reason be ‘valid’, and Article 8 guarantees the right of a worker to appeal against termination before an impartial body (International Labour Standards Department, 2009). The ILO noted that Australia directly transposed this Convention into national legislation (International Labour Standards Department, 2009: 4).

The termination of employment provisions in the former *Industrial Relations Act 1988* (Cth) relied entirely on the external affairs power to give effect to the Termination of Employment Convention (O'Neill, 2003). Although the current *Fair Work Act* draws primarily on the corporations’ power, the Convention remains relevant as an interpretative aid. The Federal Court of Australia has had regard to the provisions of this Convention to elucidate domestic legislative terms, observing that the object of the relevant provision was to give effect to Article 5(c) of the Convention (International Labour Standards Department, 2009: 18).

Beyond the ILO framework, the right not to be unjustly deprived of work is recognised in Article 6(1) of the *International Covenant on Economic, Social and Cultural Rights* (United Nations, 1966), to which Australia is a party.

The *Fair Work Act* gives domestic effect to these international obligations through its unfair dismissal regime, establishing a national system that, as the ILO observes, requires a valid reason for dismissal, guarantees procedural fairness, and provides remedies of reinstatement or compensation.

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III THE FAIR WORK ACT MODEL: ACCESSIBILITY, INFORMALITY AND THE FAIR GO ALL ROUND

The *Fair Work Act* establishes a distinctive legislative framework for resolving unfair dismissal disputes that departs markedly from conventional civil litigation. Part 3-2 of the *Fair Work Act*, which governs unfair dismissal, was deliberately designed to prioritise accessibility, procedural informality, and a balancing of interests encapsulated in the principle of 'a fair go all round' (*Fair Work Act*: s 381).

For an international audience, understanding this model is essential because it reflects a normative choice about how employment termination disputes should be resolved. That is, through an expert tribunal rather than a court, with low procedural barriers, and with an overarching commitment to industrial fairness rather than strict legalism.

Section 381(1) of the *Fair Work Act* states the object of Part 3-2 in three interrelated limbs. Firstly, establishing a framework that balances the needs of businesses and employees. Secondly, creating procedures that are 'quick, flexible and informal'. Thirdly, providing remedies with an emphasis on reinstatement. Section 381(2) of the *Fair Work Act* provides that these procedures and remedies, and the manner of deciding them, are intended to ensure 'a "fair go all round" is accorded to both the employer and employee concerned.'

This statutory formulation enshrines a principle that originated in the New South Wales industrial tribunal decision of *re Loty and Holloway v Australian Workers' Union*, where Sheldon J used the phrase to describe the broad evaluative judgment required in industrial justice ([1971] AR (NSW) 95). The principle requires that the interests of both parties be weighed, meaning the 'fair go' is not a unilateral employee protection but a bilateral norm that also encompasses the employer's legitimate managerial prerogative (Riley, 2013).

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Accessibility is a core feature of the model. Australian employees who meet the eligibility thresholds, including the minimum employment period of six months, can lodge an application with the FWC for a comparatively small filing fee, AUD $92.70 for the 2026-27 financial year, and without legal representation (Bray & Macneil, 2023). The FWC provides user-friendly application forms and free information resources, reflecting a legislative intention to minimise the barriers that typically characterise court-based adjudication. Bray and MacNeil argue FWC's continued prominence reflects its ability to adapt structurally and operationally toward accessible, staff-enabled resolution of individual disputes, while retaining its core statutory 'independent umpire' and regulatory functions (Bray & Macneil, 2023: 372).

Procedural informality further distinguishes the Australian model. The *Fair Work Act* requires the FWC to perform its functions in a manner that is 'fair and just' and 'quick, informal and avoids unnecessary technicalities.' (*Fair Work Act*: s 577) The determination of whether a person has been unfairly dismissed is usually conducted in a private conference rather than an open court unless the presiding member of the FWC considers it appropriate to do so, taking into account the views of the respective parties and whether a hearing would be the most effective and efficient way to resolve the matter in accordance with section 399 of the *Fair Work Act*.

The FWC conducts most conciliation conferences by telephone or online conference, a pragmatic innovation that significantly reduces costs and travel burdens for parties (MacDermott & Riley, 2012). This informal, conciliation-first approach is designed to resolve disputes quickly.

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Reinstatement is the primary remedy, and compensation may not be ordered unless the FWC is satisfied reinstatement is not appropriate. Compensation is capped at the equivalent of 6 months wages, signalling that the legislative purpose is not merely to compensate for wrongful termination but to restore the employment relationship where feasible (*Fair Work Act*: s 381(1)(c)).

IV THE EMERGING PROBLEM: GEN-AI, UNMERITORIOUS CLAIMS AND TRIBUNAL CAPACITY

A Measuring the Scale of the Problem

The issue emerging now is that this carefully calibrated model of alternative dispute resolution faces disruption from GenAI. The very features that make the system accessible with a low barrier to entry, informality, and an emphasis on broad industrial fairness may also render it vulnerable to a surge of GenAI-generated claims lacking a proper factual or legal basis.

The scale of the problem is evident from the statistics. FWC data shows that unfair dismissal (s. 394) and general protections applications (s. 365 and s. 372) together accounted for 21,353 (Fair Work Commission, 2024: 63-64) of the 40,190 total lodgements in 2023-24 (Fair Work Commission, 2024: 67). This comprised 14,772 unfair dismissal applications, and 6,581 general protections applications (Fair Work Commission, 2024: 63-64). In 2024-25, of 44,075 total lodgements (Fair Work Commission, 2025: 10), unfair dismissal and general protections applications together accounted for 24,326 (Fair Work Commission, 2025: 79). This comprised 16,500 unfair dismissal applications and 7,826 general protections applications (Fair Work Commission, 2025: 79). Total annual lodgements sat at approximately 30,000 until 2023 (Fair Work Commission, 2024: 8), then rose to 40,190 in 2023-24 (a 27% increase), and to 44,075 in 2024-25 (24% above the five-year average) (Hatcher, 2025).

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For 2025-26, the FWC projects between 50,000 and 55,000 lodgements, a growth of over 70% in three years, with the growth concentrated in dismissal and general protections matters (Hatcher, 2025: 1). In the first six months alone (July to December 2025), the FWC received 9,725 unfair dismissal applications, and 5,744 general protections dismissal applications (Hatcher, 2025).

In a February 2026 address to the Victorian Bar Association, FWC President Justice Adam Hatcher said the 'only reasonable inference' was that the surge was 'principally … caused by the increasing use of AI tools by potential litigants' (Hatcher, 2026: 1, 3).

The mechanisms by which GenAI produces unmeritorious claims are well documented in peer-reviewed literature. Legg, McNamara and Alimardani, drawing on a dataset of 524 cases of GenAI misuse in litigation across eight jurisdictions, identify four recurring themes: fake and incorrect case citations; flawed legal reasoning; incorrect documentation; and 'prolix documentation, "flooding" courts and tribunals' (Legg, et al., 2025:1213).

They attribute these failures to overlapping causes, namely, limited GenAI literacy, automation bias (the tendency to over-trust technology), and verification drift (where users aware of GenAI's limitations nonetheless fail to check outputs due to time pressure or the tool's persuasive tone) (Legg, et al., 2025). GenAI misuse, they conclude, 'adds to the pre-existing administrative burdens faced by courts and tribunals, creates unnecessary delays, adds to the cost of legal proceedings, and may deprive a party of legitimate arguments' (Legg, et al., 2025: 1235)

The unfair dismissal jurisdiction is particularly exposed. Justice Hatcher proved this by using ChatGPT to input hypothetical facts. Within ten minutes, it generated a ready-to-file Fair Work application, a witness statement with a 'substantially invented story', and a $40,000 compensation estimate. (Hatcher, 2026: 1, 4).

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He noted that the case ‘could not be assessed as having reasonable prospects of success’ (Hatcher, 2026: 1, 4).

Applicants are also using GenAI to bypass jurisdictional screens. Justice Hatcher observed that the majority of general protections claims under section 365 of the *Fair Work Act* are brought by applicants who have not served the qualifying period required for an unfair dismissal claim (Hatcher, 2026). The inference is that a significant portion of the surge in general protections claims appear to be unfair dismissal claims in substance, reframed by GenAI tools as general protections applications to get around eligibility requirements (Hatcher, 2026).

Reframing applications in this manner exploits the division in the *Fair Work Act*, where general protections claims are treated as assertions of legal right requiring determination, while unfair dismissal claims are handled as interest disputes through the FWC’s administrative process (Riley, 2013: 190).

The consequences for the FWC’s capacity to resource the increasing number of applications are already tangible. The FWC’s performance benchmark, 90% of reserved decisions issued within 12 weeks, has slipped to 85% for the first time in many years (Hatcher, 2026: 1, 5). Justice Hatcher acknowledges that the FWC’s capacity to deal with major cases and other time-consuming functions is being compromised and describes the continuing growth in workload as ‘unsustainable within the Commission’s current operational, performance and funding structures' (Hatcher, 2025: 1). General protections dismissal claims alone have seen a 57% increase on the three-year average in the first quarter of 2025-26 (Hatcher, 2025: 1).

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B Fair Work Commission Response

The FWC is responding. It intends to embed in its rules a mandatory GenAI disclosure requirement across all forms, requiring applicants to disclose GenAI use, verifying factual accuracy, and confirm that all cited case law exists (Hatcher, 2026). It has streamlined general protections conciliation conferences and is seeking legislative amendment to allow more matters to be dealt with on the papers and to expand powers to dismiss claims without reasonable prospects of success (Hatcher, 2026).

This response aligns with a four-part framework for managing GenAI misuse in litigation argued by Legg, McNamara and Alimardani i.e., education, certification, sanctions, and prohibition (Legg, et al., 2025: 1235). Certification, specifically, the mandated procedural safeguard that requires parties to formally attest to the accuracy or human-verified origin of a filing, is aimed at achieving accountability, and an educative function (Grossman, et al., 2023). Unfortunately, these measures alone are unlikely to resolve the increasing use of GenAI.

The emerging problem is structural. GenAI has radically lowered the cost of claim generation without any corresponding gatekeeping mechanism tailored to the self-represented litigant context, and the FWC is absorbing the consequences. Other measures are required.

V EXISTING PROCEDURAL CONTROLS AND LEGISLATIVE RESPONSE

A Existing Procedural Controls

The FWC may dismiss applications for an unfair dismissal remedy under section 399A of the *Fair Work Act* if it is satisfied that the applicant has unreasonably:

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(a) failed to attend a conference conducted by the FWC, or a hearing held by the FWC, in relation to the application; or

(b) failed to comply with a direction or order of the FWC relating to the application; or

(c) failed to discontinue the application after a settlement agreement has been concluded.

The FWC general power to dismiss applications is section 587(1) of the *Fair Work Act* where an application is not made in accordance with the Act, is frivolous or vexatious, or has no reasonable prospects of success. However, section 587(2) of the Act expressly prevents the FWC from dismissing general protections claims made under section 385, or unlawful termination claims made under section 773, on the grounds that they are frivolous, vexatious, or lack reasonable prospects of success.

This means the FWC cannot dismiss general protections claims that lack substance at the outset using these standard criteria, leaving it to process claims that may have been generated by GenAI tools with minimal factual foundation (Hatcher, 2026).

B Proposed FWC Reforms

In response to what he describes as GenAI-driven ‘disruption’ of the FWC’s operations, President Hatcher announced a suite of procedural reforms (Hatcher, 2026: 6). The centrepiece is a mandatory GenAI disclosure requirement to be embedded in all FWC forms, requiring applicants to confirm whether GenAI was used in preparing their application, to certify that all details have been checked for correctness, and all case law hyperlinked (Hatcher, 2026).

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New application and response forms requiring ‘a more rigorous articulation of the applicant’s case’ in general protections matters have also been introduced (Hatcher, 2026: 7). Case management reforms for section 365 applications include shorter conciliation conferences focused solely on settlement, with conferences terminated forthwith where parties indicate no intention to settle (Hatcher, 2026: 7).

President Hatcher’s experience trialling these new procedures is that ‘most conferences will take less than an hour, some only take five minutes, and a member can do up to five of these a day’ (Hatcher, 2026: 7). The FWC is also adopting the capacity to decide and dismiss extension of time applications that lack reasonable prospects of success ‘on the papers without requiring the employer to respond’ (Hatcher, 2026: 7).

C Legislative Reform

Justice Hatcher suggests the most effective reform would be minor amendments to sections 365 and 773 of the *Fair Work Act* to overcome the decision in *Coles Supply Chain Pty Ltd v Milford* ([2020] FCAFC 152) (‘*Milford*’), which requires the FWC to determine whether a dismissal occurred before it can conduct a conference (Hatcher, 2026). The *Milford* decision compels the FWC to make hundreds of otherwise unnecessary decisions each year, with Members running one to two-day hearings simply to determine jurisdiction (Hatcher, 2026).

The proposed amendment to the Fair Work Act introduced into the Australian Parliament on 3 June 2026 (Parliament of Australia, 2026) is a response to Justice Hatcher’s concerns, preserving substantive rights while removing an unnecessary procedural burden. President Hatcher further noted that the Commission has sought amendments to allow more matters to be dealt with on the papers and to increase its powers to dismiss matters not properly prosecuted or lacking reasonable prospects of success (Hatcher, 2026: 8).

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The proposed amendments and administrative reforms represent a welcome reset, extending GenAI certification obligations to all litigants, whether legally represented or self-represented.

Certification of a proper basis for each allegation of fact, denial, and non-admission in a substantive document of an unfair dismissal would complement these measures. However, this model as discussed in the next sections, is primarily for legal practitioners.

VI THE ORIGINS OF PROPER BASIS CERTIFICATION IN AUSTRALIAN LAW

Proper basis certification rules operate as a frontline procedural control in Australian civil law. Courts require legal representatives to certify that the content of the applications, pleadings, and the like is founded on fact, reinforced by sanctions for non-compliance and potential costs awarded against them (Legg, et al., 2025). It developed from a broader civil justice reform movement directed at discouraging unmeritorious litigation, reducing wasted court resources, and shifting litigation culture away from tactical pleading toward early, responsible assessment of factual and legal merit (Lakhani, 2006).

A New South Wales Civil Procedure

The proper basis certification's immediate Australian antecedent is New South Wales' ('NSW') 'reasonable prospects of success' regime, introduced through amendments associated with the *Civil Liability Act 2002* (NSW), amending section 198J of the *Legal Profession Act 1987* (NSW) in relation to costs in civil claims.

The 2002 NSW reforms inserted a 'reasonable prospects of success' prerequisite into the *Legal Profession Act 1987* (NSW), requiring solicitors and barristers to assess, before providing legal services or filing damages claim or defence, whether it was supported by provable facts and a reasonably arguable view of the law (Lakhani, 2006: 65-66).

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The NSW model was not framed as a universal pleading certificate. It applied to claims and defences for damages and addresses whether the case had reasonable prospects when assessed by reference to 'provable facts' and a 'reasonably arguable view of the law'. The current NSW successor, Schedule 2 to the *Legal Profession Uniform Law Application Act 2014* (NSW) ('*LPULA Act*'), preserves the same basic idea.

A legal practitioner must not provide legal services for a damages claim or defence unless the responsible practitioner reasonably believes, on provable facts and a reasonably arguable view of the law, that it has reasonable prospects of success (*LPULA Act*: sch 2 cl 2). A fact is 'provable' only if the practitioner reasonably believes the available material provides a proper basis for alleging it (*LPULA Act*: sch 2 cl 2 sub-cl 2).

B Victorian Civil Procedure

The Australian state of Victoria developed the more definite 'proper basis certification' model under section 18 of the *Civil Procedure Act 2010* (Vic) ('*CPA*'). The *CPA* formed part of a civil procedure framework directed to just, efficient, timely and cost-effective resolution of disputes (Parliament of Victoria, 2010). Section 42 of the *CPA* requires a legal practitioner, or an unrepresented party personally, to certify that each allegation of fact, denial, and non-admission in a substantive document has a proper basis on the factual and legal material available.

Rule 4.10 of the *Supreme Court (General Civil Procedure) Rules 2025* (Vic) reflects that same requirement, stating practitioners, or parties if unrepresented, must certify that a substantive document and significant amendments have a proper basis.

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The conceptual leap taken by Victoria is important. NSW certification tests the overall viability of a damages claim or defence. Victorian proper basis certification tests the factual and legal foundation of the pleading itself.

Section 42(3) of the *CPA* provides that a proper basis for an allegation or denial depends on a reasonable belief as to its truth or untruth, while a proper basis for a non-admission exists where the practitioner does not know, and therefore cannot say, whether the allegation or denial is true or untrue. This makes the certificate a front-end filter against speculative pleading, unsupported denial, and tactical non-admission.

The consequences of falsely filing a proper basis certificate are potentially serious, although they depend on whether the false certificate is inadvertent, reckless, or knowingly dishonest ([2005] NSWCA 153: [124-125]).

In Victoria, the certificate is linked to the overarching obligation insofar as a person who the overarching obligation applies must not make or respond to claims without a proper basis in accordance with section 18 of the *CPA*, and to the broader duty not to mislead or deceive in civil proceedings, consistent with section 21.

If a court is satisfied on the balance of probabilities that a person has contravened an overarching obligation, the court is authorised to make any order it considers appropriate in the interests of justice (*CPA*: s 29). Orders may include payment of legal costs or other expenses caused by the contravention, immediate enforceability of those costs, compensation for financial or other loss materially contributed to by the contravention, steps to remedy the breach, restrictions on taking further steps in the proceeding, or any other order appropriate to protect a prejudiced person (*CPA*: s 29(1)(a)). The court may act on application by a party or on its own motion (*CPA*: s 29(2)).

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In the contemporary GenAI context, certification has renewed importance especially for litigants producing misleading citations and statements of law, driven in part by automation bias and verification drift. The courts response has centred on four elements of education, certification, sanctions and prohibition (Legg, et al., 2025: 1198-1199).

C Federal Jurisdiction Rules

Under Commonwealth law, rule 16.01(c) of the *Federal Court Rules 2011* (Cth) requires that any pleading prepared by a lawyer must include a certificate signed by the lawyer stating the factual and legal material available to the lawyer provides a proper basis for:

(a) each allegation in the pleading;

(b) each denial in the pleading; and

(c) each non-admission in the pleading.

The proper basis certification must be filed with the party's first substantive document in the proceeding and any subsequent document that adds a new party, claim, cause of action, defence, material allegation, denial, or non-admission of fact or law. It must also be filed whenever such documents are amended or when the court or rules require it.

The leading decision of *Sabapathy v Jetstar Airways* (2021) 283 FCR 348, emphasises certification is not a mere formality. It is a critical part of ensuring that litigation is conducted in a manner consistent with the overarching purpose of the *Federal Court of Australia Act 1976* (Cth), which is to facilitate the just, quick, inexpensive, and efficient resolution of disputes ((2021) 283 FCR 348: [98]).

Certification ensures that the legal practitioner has directed their mind to whether each allegation being made can be sustained based on the available evidence and legal material. This

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imposes an intellectual discipline on the practitioner to ensure that the allegations are not made without a proper basis ((2021) 283 FCR 348: [100]). Failure to ensure that a claim has a proper basis may result in adverse cost orders against the practitioner responsible for the certification.

VII ADAPTING PROPER BASIS CERTIFICATION TO UNFAIR DISMISSAL CLAIMS

The challenge in adapting the civil procedure, is the certification model developed for legal practitioners under provisions such as section 198J of the *Legal Profession Act 1987* (NSW) and Rule 16.01(c) of the *Federal Court Rules 2011* (Cth), does not directly translate to self-represented litigants using GenAI tools (Legg, et al., 2025). Adapting proper basis certification requires addressing key structural differences from civil litigation. Certification must extend beyond legal practitioners to self-represented litigants.

The FWC's proposed GenAI disclosure requirement, requiring applicants to certify all details correct and all case law hyperlinked, is a step in this direction. The 'reasonable prospects' standard requires considerable adjustment for the unfair dismissal context, as section 587(1) power to dismiss applications lacking reasonable prospects is not currently available for section 365 general protections claims (*Fair Work Act)*.

A Multi-layered Framework of Reform

Adapting proper basis certification to unfair dismissal claims could be achieved through a multi-layered framework engaging both the application stage and the subsequent case management process.

First, application forms could be redesigned to require a more rigorous articulation of the applicant's case, including certification that the factual material and legal argument on which they rely provides a proper basis for each element of the claim. Applicants would be required to certify whether GenAI was used in preparing the application and, if so, to confirm that all

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details are correct and relevant, including hyperlinked case law references.

Second, the threshold for certification should be aligned to the existing statutory framework i.e., the ‘valid reason’ requirement under the Termination of Employment Convention, transposed into Australian law and reflected in the FWC's section 387 assessment of whether a dismissal was ‘harsh, unjust or unreasonable,’ provides the natural benchmark (International Labour Standards Department, 2009: 1). Applicants would certify that their claim discloses a factual basis capable of engaging one of the recognised grounds for review under section 387 of the *Fair Work Act*, mirroring how the *Legal Profession Act 1987* (NSW) section 198J model required certification that a claim had ‘reasonable prospects of success’ on the basis of provable facts and an arguable view of the law.

Third, the FWC would be empowered to dismiss applications on the papers where certification is manifestly inadequate, or where an extension of time application lacks reasonable prospects, without requiring the employer to respond. This would be complemented by the legislative amendments to sections 365 and 773 of the *Fair Work Act* to overcome the *Milford* decision, restoring the FWC's capacity to conduct a conference and issue a certificate without first determining contested jurisdictional facts.

The FWC’s research project will provide essential data for designing comprehensible certification requirements (Hatcher, 2026). Legislative amendments to increase powers to dismiss matters lacking reasonable prospects would complement any certification regime.

Finally, certification would serve an educative function. Requiring applicants to turn their mind to whether their claim has a proper basis before filing may deter GenAI-generated unmeritorious claims while preserving access for meritorious ones, with proportionate sanctions for non-compliance.

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However, as argued by Legg, McNamara and Alimardani, certification effectiveness relies on educated court users and proportionate enforcement (Legg, et al., 2025: 1229). Education about legal obligations and GenAI limitations is a necessary prerequisite.

B Costs as a Consequence of Proper Basis Certification

The proposed proper basis certification reform would interact with the existing costs regime under the *Fair Work Act* to create a meaningful disincentive against unmeritorious, GenAI-generated claims brought by self-represented applicants.

Two provisions are central. Section 400A of the *Fair Work Act*, which permits costs where a party has caused the other to incur costs by an unreasonable act or omission in connection with the conduct or continuation of the matter. And section 611(2)(b) of the *Fair Work Act*, which permits costs where it should have been reasonably apparent that the application had no reasonable prospect of success.

The case law demonstrates that self-representation does not insulate an applicant from costs where these thresholds are met. In *Hansen v Calvary Health Care Adelaide Limited* [2016] FWCFB 8162*,* the Full Bench of the FWC ordered $5,000 in costs against a self-represented appellant whose appeal was 'devoid of merit or substance as to not be reasonably arguable' ([2016] FWCFB 8162: [32]), affirming the statutory test is to be applied objectively regardless of personal circumstances. Similarly, in *Mitford Investments v Adaszko* ([2022] FWC 483), indemnity costs were awarded against a self-represented applicant under section 611(2)(b) as 'it should have been reasonably apparent' to the applicant that his applications lacked reasonable prospects of success due to a jurisdictional defect but he failed to discontinue ([2021] FWC 4632: [50]). In *O'Meley v Bara Barang Corporation Ltd* [2026] FWC 61, the FWC awarded costs under section 400A, finding the applicant's failure to discontinue after being put on notice of a valid jurisdiction objection was an unreasonable act or omission ([2026] FWC 61: [50).

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Under this model, an application that subsequently fails because it lacks a proper basis in fact and law and was warned of such in the early stage of proceedings may provide the basis of a costs order against the applicant. The proper basis certification itself would prima facie establish that the applicant turned their mind to the merits, making it more difficult to contend that the no-reasonable-prospects threshold was not 'reasonably apparent'.

Where an applicant certifies a claim containing fabricated details or hallucinated authorities, the respondent could rely on the certification as an admission that the applicant held a belief in the claim's foundation, only for that foundation to prove baseless. In such circumstances, the FWC's discretion to award costs under either section 400A or section 611(2)(b) of the *Fair Work Act* would be readily enlivened, and the respondent would be entitled to recover costs incurred in responding to a claim that the applicant's own certification process should have revealed as unmeritorious.

C Respecting the Fair Go All Round Principle

The FWC is required to perform its functions and exercise its powers in a way that ensures 'a "fair go all round" is accorded to both the employer and employee concerned.' (*Fair Work Act*: s 381(2)) It should continue to influence the FWC's consideration of all the circumstances, but it cannot displace the practical consideration of having regard to the unnecessary waste of time and cost associated with claims that are not based on provable facts and a reasonably arguable view of the law, that it has reasonable prospects of success. Certification obligations on litigants would be a reasonable measure to rebalance the scales and to filter unmeritorious claims without burdening genuine claims of unfair and unlawful dismissal.

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VIII CONCLUSION

The GenAI era has arrived and the law is not immune.

The FWC's unfair dismissal jurisdiction, designed for accessibility, informality, and the principle of a 'fair go all round', now faces a surge of GenAI-generated claims that threaten to overwhelm its capacity and undermine its statutory objectives. The considerable increase in total lodgements over three years, the growing proportion of general protections claims that are unfair dismissal claims in disguise, and the slippage in the FWC's performance benchmarks all confirm that existing procedural controls are insufficient for an era in which any dismissed employee can generate a form-ready application with fabricated facts in under ten minutes.

Extending proper basis certification from Australian civil procedure to the unfair dismissal jurisdiction offers a practical, and established response. Adapted to the self-represented litigant context and calibrated to the existing statutory framework, certification would require all applicants to turn their minds to the factual and legal foundation of their claim before filing.

Proper basis certification is not inconsistent with fair procedures. It is an element of fair procedures that preserve access to justice for meritorious claims while providing the FWC with a front-end filter against claims that lack a proper basis, safeguarding the uniquely Australian commitment to a fair go all round.

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